



BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

MARC SPITZER, Chairman
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
MIKE GLEASON
KRISTIN K. MAYES

Arizona Corporation Commission

DOCKETED

APR 6 2004

DOCKETED BY

NR

STAFF of the Utilities Division,

Complainant,

v.

JOHNNY A. MCLAIN, dba MIRACLE VALLEY
Water Company, Cochise Water Company,
Horseshoe Ranch Water Company, Crystal Water
Company, Mustang Water Company, Coronado
Estates Water Company & Sierra Sunset Water
Company, an individual and JOHNNY A. AND
LINDA M. MCCLAIN, a marital community,

Respondents,

MIRACLE VALLEY WATER COMPANY, INC.,
in Arizona Corporation,

Respondent.

DOCKET NOS. W-01646A-03-0601
W-01868A-03-0601
W-02235A-03-0601
W-02316A-03-0601
W-02230A-03-0601
W-01629A-03-0801
W-02240A-03-0601

DECISION NO. 66897

OPINION AND ORDER

December 19, 2003

Tucson, Arizona

Jane L. Rodda

Steve Wene, MOYES STOREY, LTD.
And Michael Baldwin, on behalf of
Johnny and Linda McLain; and

Jason Gelman, Legal Division Staff
Attorney on behalf of the Utilities
Division.

DATE OF ORAL ARGUMENT:

PLACE OF ORAL ARGUMENT:

ADMINISTRATIVE LAW JUDGE:

APPEARANCES:

BY THE COMMISSION:

On August 22, 2003, Staff of the Utilities Division ("Staff") of the Arizona Corporation Commission ("Commission") filed a Complaint, Petition for Order to Show Cause and Petition for Order for Interim Relief ("Petition") against Johnny A. McLain dba Miracle Valley Water Company, Cochise Water Company, Horseshoe Ranch Water Company, Crystal Water Company, Mustang

Water Company, Coronado Estates Water Company and Sierra Sunset Water Company, Johnny A McLain and Linda M. McLain, and Miracle Valley Water Company, Inc. In the Petition, Staff alleged that the water systems owned and/or operated by Johnny McLain are not providing safe, sufficient, adequate and reasonable water service; that the Arizona Department of Environmental Quality ("ADEQ") has issued several notices of violations ("NOVs") against all of the above water systems operated by McLain; that there have been 14 informal complaints against McLain dba Cochise Water Company ("Cochise") and 67 informal complaints against McLain dba Horseshoe Ranch Water Company ("Horseshoe Ranch") for water outages and/or inadequate water pressure; that Cochise, Horseshoe Ranch, McLain dba Sierra Sunset Water Company ("Sierra Sunset") and McLain dba Miracle Valley Water Company ("Miracle Valley") are operating without valid Certificates of Convenience and Necessity ("CC&Ns"); that the Utilities Division annual report and the Corporations Division Annual report for Miracle Valley are inconsistent; and that McLain has failed to rectify the situations with any of the water companies.

On September 16, 2003, the Commission issued Decision No. 66241, an Order to Show Cause and Order for Interim Relief ("OSC"). The OSC found among other things, that the ADEQ NOVs include no microbiological site sampling plan; insufficient or no storage, no backflow prevention programs, no emergency operating plan, no approvals to construct and/or no approvals of construction; that McLain is operating Miracle Valley, Cochise and Horseshoe Ranch without proper certification and that his operation is in violation of state law and endangering public health, safety or welfare; and that ADEQ issued compliance reports for all water systems on July 1, 2003 and all the reports note major deficiencies with all seven systems. Among other things, Decision No. 66241 authorized Staff to appoint a manager for the water systems for Miracle Valley, Cochise, Horseshoe Ranch, Crystal Water Company ("Crystal"), Mustang Water Company ("Mustang"), Coronado Estates Water Company ("Coronado"), and Sierra Sunset. The OSC also ordered Respondents to appear and show cause at a place designated by the Hearing Division: why its service should not be found unjust and unreasonable; why a Manager should not be appointed; why Miracle Valley, Cochise, Horseshoe Ranch, Crystal, Mustang, Coronado and Sierra Sunset should not indemnify, defend and hold harmless the Manager; why the Manager should not be given the authority to

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1 explore, negotiate and implement a long-term solution; and why existing Certificates of Convenience
2 and Necessity should not be revoked, and McLain should not be ordered to find a fit and proper entity
3 to assume the Certificates of Convenience and Necessity and acquire the assets of Miracle Valley,
4 Cochise, Horseshoe Ranch, Crystal, Mustang, Coronado and Sierra Sunset, subject to the approval of
5 the Commission as required by law; why McLain should not be found to be the alter ego of Cochise,
6 Horseshoe Ranch, Crystal, Mustang, Coronado and/or Sierra Sunset, in the alternative, should it be
7 discovered that any of the entities are incorporated; and why McLain should not be found to be held
8 personally responsible for the actions or inactions of Miracle Valley, Cochise, Horseshoe Ranch,
9 Crystal, Mustang, Coronado and Sierra Sunset. The OSC provides that the appointment of the
10 Manager should be in effect while proceedings in the docket are pending or until otherwise ordered
11 by the Commission, and that the Respondents may apply at any time for the termination of the
12 appointment of the Manager upon a showing that they have acquired sufficient technical, financial,
13 and managerial capabilities to operate the water systems. The OSC provided that if Respondents
14 intended to appear and show cause as ordered therein, they shall file within 10 days of the effective
15 date of the Order a preliminary statement describing how they will make the showing of cause, which
16 showing must include an Answer to Staff's Complaint if not yet filed.

17 On or about October 14, 2003, pursuant to Decision No. 66241, Staff and Southwestern
18 Utility Management, Inc. ("SUM") entered into an Interim Management Agreement.¹

19 On October 23, 2003, Respondents Johnny and Linda McLain filed with the Commission a
20 Notice of Bankruptcy, indicating that on July 30, 2003 McLain had filed for relief under Title 11 of
21 the United States Code, initiating a Chapter 13 proceeding.

22 On October 27, 2003, Respondents filed a Motion to Stay Appointment of Interim Manager
23 ("Motion").

24 Pursuant to Procedural Order dated October 10, 2003, on October 31, 2003, Respondents filed
25 an Answer to the OSC.

26 On November 6, 2003, Staff filed a Response to the Motion.

27 ¹ Although SUM entered into an Interim Management Agreement with Staff, in light of Respondents' challenge to the
28 Commission's authority to enter into such agreement, on Staff's instructions, SUM has not taken any actions with respect
to operating the subject systems.

1 On November 17, 2003, Respondents filed a Reply.

2 By Procedural Order dated November 24, 2003, the matter was set for oral argument on
3 December 19, 2003.

4 Respondents' Position

5 In their Motion, Respondents argue that the Commission should stay the appointment of the
6 interim manager ~~for~~ any and all of the following reasons: 1) the federal bankruptcy court has
7 jurisdiction over Johnny and Linda McLain and the water companies; 2) the Commission's notice is
8 inadequate and violates due process; 3) the Commission's notice violates **Ariz.** R. Civ. Pro. 5(a); 4)
9 the Commission's open meeting notice violated open meeting laws; 5) McLain has not been give a
10 meaningful and fair hearing in violation of due process; 6) Staffs appointment of an interim manager
11 ignores the provision in Decision No. 66241 delegating that authority to the court after McLain has a
12 hearing; 7) the Commission does not have the authority to manage the affairs of a corporation; 8)
13 Staff did not comply with A.A.C R14-3-110(A); and 9) Staff has not shown a clear and present
14 danger to public health and welfare.

15 First, Respondents argue that under bankruptcy law, actions against debtor property are
16 automatically stayed, and actions that violate the automatic stay, including actions by a state agency,
17 are void.² Respondents argue that the federal bankruptcy court is the proper forum to determine the
18 scope of the automatic stay and whether any exception applies. Respondents assert that without
19 bankruptcy court approval, the Commission cannot take action that deprives McLain and the
20 bankruptcy of estate assets, which includes the purported appointment of an interim manager.

21 Further, Respondents argue that Staffs taking control of the water systems from McLain
22 before he has either proper notice or a fair and meaningful opportunity to be heard, violates du
23 process. At a minimum, Respondents argue, due process requires that people have a right to notice
24 and an evidentiary hearing prior to judicial action being taken against them, and that the hearing be
25 meaningful and fair. Respondents assert that the agenda for the September 10, 2003, Open Meeting
26 only listed "Complaint" as the matter o be discussed. Respondents argue that the Commission did
27

28 ² 11 U.S.C. § 362(a), and *In re Schwartz*, 954 F.2d 569 (9th Cir. 1992). *Contractors State License Board of Calif. v. Dunbar*, 245 F3d 1058 (9th Cir. 2001).

1 not provide McLain adequate notice of the meeting that resulted in the appointment of the interim
2 manager. Rule 5(a) of the Arizona Rules of Civil Procedure requires that notices and decisions be
3 served upon each party in judicial proceedings. Thus, Respondents argue, the Commission should
4 have served McLain with notice of the Open Meeting.

5 Moreover, Respondents argue the agenda of the September 10, 2003 Open Meeting failed to
6 comply with the notice requirements for a proper Open Meeting, and any action taken at that meeting
7 would be void. Respondents assert that open meeting agendas must identify "specific matters to be
8 discussed, considered or decided at the meeting so as to inform the public of the matter to be
9 discussed or decided." A.R.S. §§ 38-431.02 and 38-431.09. Respondents argue that merely
10 identifying McLain, the water companies, docket numbers and "Complaint" is not enough detail to
11 inform the public at large that the Commission contemplated to appoint an interim manager for the
12 water companies, decide issues of fact and make legal conclusions.

13 Respondents argue that Staff's appointment of the interim manager violates the Commission's
14 own rules which require that McLain have the right to present evidence before he is deprived of this
15 property. A.A.C R14-3-110(A) states, "[a] proceeding is submitted for decision by the Commission
16 after taking evidence, the filing of briefs or the presentation of oral argument as may have been
17 prescribed by the presiding officer." (emphasis added). Respondents argue that allowing Staff and
18 the interim manager to assume control of the water companies before a hearing on that issue would
19 render the hearing a sham.

20 Respondents also argue that by entering into the agreement with Mr. Lewis as interim
21 manager prior to the hearing contemplated by Decision No. 66241, Staff is ignoring the
22 Commission's order and the "well-settled" law that the Commission does not have the authority to
23 manage the affairs of a corporation. They assert that appointing an interim manager exceeds the
24 Commission's authority. In Southern Pacific Co. v. Ariz. Corp. Comm., 98 Ariz. 339, 404 P.2d 692
25 (1965), the Arizona Supreme Court stated "[i]t must never be forgotten that, while the state may
26 regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property or
27 public utility companies, and is not clothed with the general power of management incident to
28 ownership." In this case, according to Respondents, Staff purports to grant itself ultimate ownership

1 authority to decide whom to hire, delegate tasks, and require the actual owner to not hold them
2 responsible for their misdeeds. Respondents argue this violates the Supreme Court's clear limitations
3 is expressed in Southern Pacific.

4 Finally, Respondents argue that Staff has not claimed that there is a "clear and present
5 danger" to public health and safety to justify appointing the interim manager. Respondents state that
6 "clear and present danger" means that the substantive evil must be extremely serious and the degree
7 of imminence extremely high. They believe the evidence will show that McLain's operation of the
8 water companies does not constitute an extremely serious evil. They argue that neither the Order for
9 an interim manager, nor the underlying affidavits, identify a single imminent, clear and present
10 danger to public health and safety. Nor do the allegations, in their opinion even meet the lower
11 standard of "imminent threat." Respondents claim that because ADEQ can test the water now and in
12 the future to ensure that water quality standards are met, Staffs argument that it is unable "to
13 determine if water provided for Cochise and Mustang customers meets water quality standards is
14 patently untrue."

15 Staffs Position

16 Staff argues that the appointment of the interim manager does not deny McLain of any due
17 process as he has no vested property right in future payments. Staff asserts that McLain has a
18 property right in the assets comprising the seven water systems at issue, however, he has no
19 property right in future payments from the customers of these water systems because the future
20 payments are made in consideration for reliable and safe water service. According to Staff, McLain
21 has no vested right to these payments if he fails to provide safe and adequate water service in
22 accordance with Arizona law. Staffs affidavits attest to McLain failing to provide such service and
23 lacking the managerial and financial ability to provide such service. Staff states the appointment of
24 the interim manager is to ensure that safe and adequate water service is provided, and since McLain's
25 interest in his property is not affected, he has not been deprived of this right to due process by the
26 approval of an interim manager.

27 Staff states the order appointing the interim manager simply gives the manager the
28 opportunity to explore and pursue the sale or transfer of the water systems, but any such sale or

1 transfer would be subject to a hearing pursuant to A.R.S. §§ 40-282 and 40-285. Staff agrees that no
2 property rights could be taken from McLain without a hearing, but the Order appointing the interim
3 manager does no such thing. In any case, Staff asserts, by ordering the Hearing Division to set the
4 matter for hearing, the Commission is giving Respondents adequate opportunity to contest all counts
5 in the Complaint and the appointment of the interim manager.

6 Staff asserts that the process and Order approving the appointment of the interim manager
7 complies with the Arizona Open Meeting Law. Staff argues that so long as there is substantial
8 compliance (as determined by looking at the whole proceeding) with the open meeting law, actions
9 by the public body are not null and void. Karol v Board of Education Trustees, 122 Ariz. 95, 98, 593
10 P.2d 649, 652 (1979) and Carefree Improvement Association v. City of Scottsdale, 133 Ariz. 106,
11 112, 649 P.2d 985, 991 (App. 1982). Staff states that in examining this charge, it is important to
12 focus on events that happened prior to the Open Meeting. In this case, the Complaint was filed on
13 August 22, 2003, almost three weeks before the Open Meeting, and was mailed to McLain at various
14 addresses of record. The Complaint included a copy of the proposed order. The agenda of the open
15 meeting included this item as a complaint and listed all of the systems affected as well as the
16 individual docket numbers. The Commission approved the order as proposed, and McLain appeared
17 at the Open Meeting and was allowed to speak on the whether the Commission should approve the
18 order. Thus, McLain had sufficient notice of the action the Commission was contemplating against
19 him.

20 Staff argues that the appointment of an interim manger is an appropriate measure to ensure the
21 public interest and does not exceed Commission authority. In this case, Staff claims that the
22 Commission determined that due to the serious risk of harm to McLain's customers as presented in
23 the Complaint and in affidavits attached to the Complaint, an interim manager is appropriate. The
24 appointment of the interim manager pending a final outcome in the matter is a temporary measure to
25 ensure safe and reasonable water. Staff believes this action is well within the Commission's
26 authority, ensures the public interest, and should not be stayed. Staff distinguishes this situation from
27 that in the Southern Pacific case cited by Respondents, where the Court invalidated a Commission
28 order to maintain train schedules. Staff states that in the Southern Pacific case, there was no evidence

presented that Southern Pacific's revised schedules violated its obligations as required by statute. Staff cites dicta in Southern Pacific that "in the exercise of the regulatory power, the legislature may interfere with the management of public utilities whenever public interest demands, but there is no presumption of an attempt on the part of the legislature to interfere with a corporation any further than the public interest requires and no interference will be adjudged by implication beyond the clear letter of a statute." Id., at 343, 404 P.2d at 694 quoting Chesapeake & Potomac Telephone Co. v. Manning, 186 U.S. 238, 22 S.Ct. 881 (1902).

Staff asserts that an imminent threat to water customers has been shown. The Complaint Staff filed lists major deficiencies in all seven of McLain's water systems. Some of the deficiencies include an inability to determine if water provided for Cochise and Mustang customers met water quality standards. Staff asserts that the affidavits attached to the Complaint state that McLain is incapable of providing safe, reliable and reasonable service going-forward. Staff argues that the "clear and present danger" standard cited by Respondents is not applicable to the appointment of an interim manager, but even so, the potential for harm to the public from unsafe water necessitates a swift and expedient action by the Commission.

Staff argues that the proceeding should not be stayed simply because of the pending bankruptcy, as this administrative proceeding, and the approval of the interim manager, fall under the exception to the automatic stay of the bankruptcy laws. Under Section 362(b) of the bankruptcy laws, certain proceedings are excepted from the automatic stay. Section 362(b)(4) excepts:

The commencement or continuation of an action or proceeding by a governmental unit. . . to enforce such governmental unit's. . . police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's. . . police or regulatory power.

Thus, under section 362(b)(4), the government, including state public utility commissions, is able to initiate or continue an action under its police or regulatory powers without the restrictions of the automatic stay. According to the legislative history of this exception, a governmental unit is not stayed from bringing an action "to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law." S.Rep., No. 95-989 at 52 (1977).

1 Staff states that in determining whether certain governmental actions are taken to enforce the
2 government's police and regulatory power, the courts employ both the "pecuniary purpose" and
3 "public policy" tests. Under the pecuniary interest test, unless the action is pursued solely to advance
4 a pecuniary interest of the governmental unit, the stay is not imposed. The "public policy" test
5 distinguishes between government actions that effectuate public policy and those that adjudicate
6 private rights. Staff asserts that the Commission's actions here do not protect any pecuniary interest
7 of the debtor's property and the Commission is not requiring any money to be paid into the state's
8 coffers. Furthermore, neither the State of Arizona or its citizens gain an economic advantage over a
9 creditor of the bankruptcy estate. The Commission's actions are in furtherance of a broad public
10 policy that protects the public health by ensuring a potable water supply.

11 An exception of the exception to the automatic stay prevents action to enforce money
12 judgments even if brought pursuant to the government's police and regulatory powers. Staff asserts
13 that here, the Commission's appointment of an interim manager is not the enforcement of a money
14 judgment. Staff argues that governmental actions that are intended to protect the public health, but
15 require the expenditure of money, have consistently been excepted from the automatic stay. Staff
16 argues that the appointment of an interim manager to control the water companies within the
17 bankruptcy estate does not trigger the automatic stay. Staff cites Securities Exchange Comm'n v.
18 First Financial Group, 645 F.2d 429 (5th Cir. 1981), in which the court found that the appointment of
19 a receiver to control the assets of the bankruptcy estate was necessary to protect the public welfare
20 and is not prevented by the automatic stay.

21 Resolution

22 We find that Decision No. 66241 is a valid Order of the Commission that should be enforced
23 as issued. As set forth below, we find that the Commission action at its September 10, 2003, Open
24 Meeting, wherein the Commission adopted Decision No. 66241 that appointed the interim manager,
25 was a valid action under the Open Meeting laws, that Respondents were afforded the required due
26 process, that the Commission has authority to appoint an Interim Manager, and that neither that
27 action nor further action is foreclosed by the automatic stay of the bankruptcy laws.

28 Respondents challenge the adequacy of the notice of the Open Meeting during which the

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Commission adopted Decision No. 66241. We find that the Commission's notice of the September 10, 2003, Open Meeting did not violate Open Meeting laws, and the Commission's actions taken at that Open Meeting are valid.

The notice provisions of the Open Meeting law are contained in A.R.S. § 38-431.02(G) and (H) as follows:

(G) Notice required under this section shall include an agenda of the matters to be discussed or decided at the meeting or information on how the public may obtain a copy of such agenda. The agenda must be available to the public at least twenty-four hours prior to the meeting, except in the case of an actual emergency under subsection D.

(H) Agendas required under this section shall list the specific matters to be discussed, considered or decided at the meeting. The public body may discuss, consider or make decisions only on matters listed on the agenda and other matters related thereto.

The Open Meeting statute must be read as a whole to arrive at the intent of the legislature. Karol, 122 Ariz. at 97.

The intent of the legislature was to open the conduct of the business of government to the scrutiny of the public and to bar decision-making in secret. Id.

* * * * *

A meeting held in the spirit of this enunciated policy is a valid meeting. . . . The statute does not describe what factual disclosure must accompany a legal action taken during a public meeting. . . . we do not believe, in order to conduct a meeting openly, the public body need disclose every fact, theory, or argument pro or con raised in its deliberations, or every detail of the recommended decision on which a vote is about to occur We believe therefore that the stated intent of the statute requires that all legal actions be preceded both by disclosure of that amount of information sufficient to apprise the public in attendance of the basic subject matter of the action so that the public may scrutinize the action taken during the meeting, and be an indication of what information will be available in the minutes pursuant to A.R.S. § 38-431.01(b) so that the public may, if it desires, discover and investigate further the background or specific facts of the decision." Id. at 98.

The notice of the Open Meeting at issue met the requirements of the statute. It contained an agenda that included the names of the Respondents, the docket numbers of the matters and an indication that this was a Complaint. We find that it disclosed that amount of information sufficient

1 to apprise the public in attendance of the basic subject matter of the action so that the public may
 2 scrutinize the action. The Complaint and proposed Order were available to any member of the public
 3 desiring more specific information. Respondents have cited no authority that requires greater
 4 description of the matter in the Notice of the Open Meeting. The Sample Form agenda they attach to
 5 their Reply (Attachment 1) does not convince us that the form of Notice in this instant case was
 6 defective. The agenda provided with the Notice lists "the specific matters to be discussed, considered
 7 or decided at the meeting" as required under A.R. S. § 38-341.02(H).

8 Respondents claim that service of the Complaint violated due process. Staff brought the
 9 Complaint pursuant to A.R.S. § 40-246 which provides relative to service that "[s]ervice may be made
 10 as a summons in a civil action is required to be served, or may be made in any manner giving actual
 11 notice, and no irregularity in the service is an excuse or defense." By mailing a copy of the Petition
 12 and Complaint via first class United States mail to addresses of record for Respondents, the
 13 Commission provided notice as required by the statute. Respondents do not claim that they did not
 14 receive a copy of the Petition. Indeed, McLain appeared at the Open Meeting and knew the nature
 15 of the charges. Under these circumstances there has been no violation of due process as a result of
 16 deficiency of service.

17 Respondents also argue that the Commission does not have authority to appoint a manager
 18 citing to the Southern Pacific case. A.R.S. § 40-202(A) provides:

19 The commission may supervise and regulate every public service
 20 corporation in the state and do all things, whether specifically designated
 21 in this title or in addition thereto, necessary and convenient in the exercise
 of that power and jurisdiction.

22 In Southern Pacific, the Arizona Supreme Court held that the Commission could not rearrange the
 23 petitioner's train service without a judicial determination that the service involved was inadequate.
 24 The Court found that the Commission's general order that prohibited a curtailment of service until
 25 authority has been obtained from the Commission, which order the Commission purported to issue
 26 pursuant to A.R.S. § 40-202, was inconsistent with the legislative enactment of A.R.S. § 40-367,
 27 which provided that no change shall be made except after 30 days notice to the Commission. The
 28 Court found the 30 day period was intended to afford the Commission time to conduct a hearing. In

1 the instant case, in appointing the Interim Manager, the Commission is not relying on an order that
2 conflicts with a legislative grant of authority, but rather on valid Commission Decisions and
3 Commission and ADEQ regulations that Respondents have allegedly violated. We do not believe
4 the holding in Southern Pacific precludes the Commission's actions taken in this case.

5 Staff alleged serious deficiencies in McLain's operation of the water systems, and supported
6 its allegations with affidavits. In adopting the Order appointing the Interim Manager, the
7 Commission understood the severity of the requested interim relief and balanced it against the
8 seriousness of the charges. The Commission does not take such action lightly, nor should it. Here
9 Staff alleges, with supporting affidavits, that Respondents have persistently been unable or unwilling
10 to address deficiencies in the water systems affecting water adequacy and quality of the various
11 systems. See Petition. For several of the systems ADEQ cannot determine if they are providing
12 water that meets quality standards because Respondents have failed to conduct required water tests.
13 Respondents try to minimize the seriousness of the charges against them, and even suggest that it is
14 the responsibility of the Commission to test water quality. See Respondents Reply at p 9. It is
15 interesting that Respondents argue that the Commission has no authority to manage the water
16 systems, but should take on a major responsibility of their operation. We believe that Staff has met
17 its threshold of showing sufficient danger to the public health and safety that the Commission was
18 justified in appointing the Interim Manager in Decision No. 66241 prior to a hearing. That
19 appointment is temporary until the Commission can hold a full evidentiary hearing. We find no
20 requirement that Staffs showing rise to the level of clear and present danger. The statute does not
21 proscribe a specific standard. When dealing with issues of water quality and adequacy of service, the
22 potential danger to the public's health and safety warrants such remedial interim actions.

23 Respondents argue that the automatic stay of the U. S. Bankruptcy laws prevents the
24 Commission from appointing an interim manager or taking further action against Respondents related
25 to this Complaint. We find, however, that the exception to the automatic stay afforded by Section
26 362(b)(4) permits the Commission to commence or continue an action to enforce its police and
27 regulatory power. See In Re Pacific Gas and Electric Co. v. Calif. PUC, 263 B.R. 306 (N.D. Cal.
28 2001). With respect to determining the scope of the automatic stay, the bankruptcy court has final

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1 authority. See In Re Dunbar.

2 Notwithstanding the foregoing, we note that on February 19, 2004, Staff filed a Notice that it
3 had filed a Motion for Relief from the Automatic Stay ("Lift Stay Motion") in the U. S. Bankruptcy
4 court. We believe that Staff's actions in the bankruptcy court are well taken given the circumstances
5 of this case. For the reasons set forth above, the Commission's appointment of the Interim Manager
6 in Decision No. 66241 was valid and Staff was authorized to enter into the agreement with the
7 Interim Manager. Therefore, the Interim Manager should be able to operate under the Interim
8 Management Agreement pending a bankruptcy court decision on the Lift Stay Motion and further
9 Commission action as contemplated under Decision No. 66241.

10 * * * * *

11 Having considered the entire record herein and being fully advised in the premises, the
12 Commission finds, concludes, and orders that:

13 **FINDINGS OF FACT**

14 1. On August 22, 2003, Commission Staff filed a Complaint, Petition for Order to Show
15 Cause and Petition for Order for Interim Relief against Johnny A. McLain dba Miracle Valley Water
16 Company, Cochise Water Company, Horseshoe Ranch Water Company, Crystal Water Company,
17 Mustang Water Company, Coronado Estates Water Company and Sierra Sunset Water Company;
18 Johnny A. McLain and Linda M. McLain, and Miracle Valley Water Company, Inc.

19 2. In the Petition, Staff alleged that the water systems owned and/or operated by Johnny
20 McLain are not providing safe, sufficient, adequate and reasonable water service; that ADEQ has
21 issued several NOV's against all of the above water systems operated by McLain; that there have
22 been 14 informal complaints against McLain dba Cochise Cochise and 67 informal complaints
23 against McLain dba Horseshoe Ranch for water outages and/or inadequate water pressure; that
24 Cochise, Horseshoe Ranch, McLain dba Sierra Sunset and McLain dba Miracle Valley are operating
25 without valid CC&Ns; that the Utilities Division annual report and the Corporations Division
26 Annual report for Miracle Valley are inconsistent; and that McLain has failed to rectify the
27 situations with any of the water companies.

28 3. On August 22, 2003, Staff mailed the Petition and Complaint to Respondents via first

1 class U. S. mail.

2 4. On September 10, 2003, the Commission considered the Petition at its regularly
3 scheduled open meeting, where the Commission voted to adopt the Complaint as proposed by Staff.
4 McLain appeared at the September 10, 2003 Open Meeting and spoke in his own behalf.

5 5. On September 16, 2003, the Commission issued Decision No. 66241, an OSC which
6 found among other things, that the ADEQ NOVs include no microbiological site sampling plan;
7 insufficient or no storage, no backflow prevention programs, no emergency operating plan, no
8 approvals to construct and/or no approvals of construction; that McLain is operating Miracle Valley,
9 Cochise and Horseshoe Ranch without proper certification and that his operation is in violation of
10 state law and endangering public health, safety or welfare; and that ADEQ issued compliance
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12 seven systems. Among others things, Decision No. 66241 authorized Staff to appoint a manager for
13 the water systems for Miracle Valley, Cochise, Horseshoe Ranch, Crystal, Mustang, Coronado and
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17 Mustang, Coronado and Sierra Sunset should not indemnify, defend and hold harmless the Manager;
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19 solution; and why existing Certificates of Convenience and Necessity should not be revoked, and
20 McLain should not be ordered to find a fit and proper entity to assume the Certificates of
21 Convenience and Necessity and acquire the assets of Miracle Valley, Cochise, Horseshoe Ranch,
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23 required by law; why McLain should not be found to be the alter ego of Cochise, Horseshoe Ranch,
24 Crystal, Mustang, Coronado andor Sierra Sunset, in the alternative, should it be discovered that any
25 of the entities are incorporated; and why McLain should not be found to be held personally
26 responsible for the actions or inactions of Miracle Valley, Cochise, Horseshoe Ranch, Crystal,
27 Mustang, Coronado and Sierra Sunset. The OSC provides that the appointment of the Manager
28 should be in effect while proceedings in the docket are pending or until otherwise ordered by the

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2 of the Manager upon a showing that they have acquired sufficient technical, financial, and
3 managerial capabilities to operate the water systems. The OSC provided that if Respondents
4 intended to appear and show cause as ordered therein, they shall file within 10 days of the effective
5 date of the Order a preliminary statement describing how they will make the showing of cause,
6 which filing must include an Answer to Staff's Complaint if not yet filed.

7 6. On or about October 14, 2003, Staff and SUM entered into an Interim Management
8 Agreement.

9 7. On October 23, 2003, Respondents Johnny and Linda McLain filed with the
10 Commission a Notice of Bankruptcy, indicating that on July 30, 2003 McLain had filed for relief
11 under Title 11 of the United States Code, initiating a Chapter 13 proceeding.

12 8. On October 27, 2003, Respondents filed a Motion to Stay Appointment of Interim
13 Manager.

14 9. Pursuant to Procedural Order dated October 10, 2003, on October 31, 2003,
15 Respondents filed an Answer to the OSC.

16 10. On November 6, 2003 Staff filed a Response to the Motion.

17 11. On November 17, 2003, Respondents filed a Reply.

18 12. By Procedural Order dated November 24, 2003, the matter was set for oral argument
19 on December 19, 2003.

20 13. On February 19, 2004, Staff filed a Notice that it had filed a Lift Stay Motion in the
21 U.S. Bankruptcy Court.

22 14. A.R.S. § 38-431.02(G) and (H) as follows:

23 (G) Notice required under this section shall include an agenda of the
24 matters to be discussed or decided at the meeting or information on how
25 the public may obtain a copy of such agenda. The agenda must be
26 available to the public at least twenty-four hours prior to the meeting,
27 except in the case of an actual emergency under subsection D.

28 (H) Agendas required under this section shall list the specific matters to
be discussed, considered or decided at the meeting. The public body may
discuss, consider or make decisions only on matters listed on the agenda
and other matters related thereto.

15. The Commission's Notice of the September 10, 2003 Open Meeting complied with A.R.S. § 38-431.02.

16. A.R.S. § 40-202(A) provides:

The commission may supervise and regulate every public service corporation in the state and do all things, whether specifically designated in this title or in addition thereto, necessary and convenient in the exercise of that power and jurisdiction.

17. Pursuant to A.R.S. § 40-202, the Commission has authority to appoint the Interim Manager as provided in Decision No. 66241.

18. A.R.S. §40-246 provides that the Commission may bring complaints against public service corporations for violation of law, or Order or rule of the Commission and provides that "[s]ervice may be made as a summons in a civil action is required to be served, or may be made in any manner giving actual notice, and no irregularity in the service is an excuse or defense."

19. By mailing the Petition and Complaint to Respondents at their addresses of record on August 22, 2003, the Commission complied with the service requirements of A.R.S. §40-246.

20. The exception to the automatic stay afforded by Section 362(b)(4) of the United States Bankruptcy Code permits the Commission to commence or continue an action to enforce its police and regulatory power.

21. The Commission's actions in Decision No. 66241, as well as future actions to conduct a hearing and enter a final Order on the merits in this matter are not stayed by the United States Bankruptcy Code.

22. The appointment of the Interim manager pursuant to Decision No. 66241 was a valid action of the Commission, and the Interim Manager shall operate the affairs of the water systems under the Interim management Agreement.

23. It is in the public interest for reasons of judicial economy to await a bankruptcy court ruling on the Lift Stay Motion prior to setting this matter for further proceedings.

CONCLUSIONS OF LAW

1. Johnny A. McLain dba Miracle Valley Water Company, Cochise Water Company, Horseshoe Ranch Water Company, Crystal Water Company, Mustang Water Company, Coronado

1 Estates Water Company and Sierra Sunset Water Company are public service corporations pursuant
2 to Article 15 of the Arizona Constitution and A.R.S. §40-246.

3 2. The Commission has jurisdiction over the subject matter of the Petition and Complaint
4 against Respondents.

5 3. Notice of the proceedings in the matter was provided as required by law.

6 4. Decision No. 66241, including the appointment of the Interim Manager, is a valid and
7 enforceable Order of the Commission.

8 **ORDER**

9 IT IS THEREFORE ORDERED that the Motion to Stay the Appointment of Interim Manager
10 is denied.

11 IT IS FURTHER ORDERED that the Interim Manager shall have authority to operate the
12 Miracle Valley Water Company, Cochise Water Company, Horseshoe Ranch Water Company,
13 Zrystal Water Company, Mustang Water Company, Coronado Estates Water Company and Sierra
14 Sunset Water Company, and Miracle Valley Water Company, Inc. water systems under authority of
15 the Interim Management Agreement until either the Bankruptcy Court or Commission issues an order
16 otherwise.

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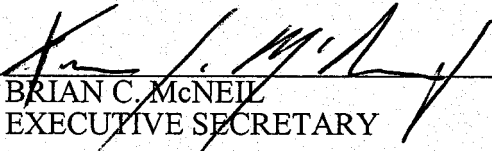
IT IS FURTHER ORDERED that Staff shall file its recommendation for a procedural schedule as soon as practicable after the ruling of the Bankruptcy Court on its Lift Stay Motion.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

 CHAIRMAN	 COMMISSIONER	 COMMISSIONER
 COMMISSIONER	 COMMISSIONER	

IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive Secretary of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this 6th day of April, 2004.


BRIAN C. McNEIL
EXECUTIVE SECRETARY

DISSENT _____

DISSENT _____

1 SERVICE LIST FOR:

JOHNNY A. MCLAIN, DBA MIRACLE VALLEY
WATER COMPANY, COCHISE WATER
COMPANY, HORSESHOE RANCH WATER
COMPANY, CRYSTAL WATER COMPANY,
MUSTANG WATER COMPANY, CORONADO
ESTATES WATER COMPANY, SIERRA SUNSET
WATER COMPANY

2 DOCKET NO.: DOCKETS NOS.

W-01646A-03-0601
W-01868A-03-0601
W-02235A-03-0601
W-02316A-03-0601
W-02230A-03-0601
W-01629A-03-0601
W-02240A-03-0601

3 Johnny A. McLain
4 Sierra Sunset Water Company
5 P.O. Box 2903
6 Sierra Vista, AZ 85636

7 Johnny A. McLain
8 Miracle Valley Water Company
9 Cochise Horseshoe Ranch Water Company
10 Crystal Water Company
11 Coronado Estates Water Company
12 7110 Jaxel Road
13 Hereford, AZ 85615

14 Johnny A. McLain
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17 Hereford, AZ 85615

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